IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 17221 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ARUNCHANDRA RATILAL BISCUITWALA - Petitioner(s)
Versus
KANTILAL RATILAL BISCUITWALA & 8 - Respondent(s)

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Appearance :

MR PV HATHI for Petitioner(s) : 1,
MR JB PARDIWALA for Respondent(s) : 1 - 2, 6,
None for Respondent(s) : 3,
RULE SERVED for Respondent(s) : 3.2.1,3.2.2 - 5,7 - 8.
UNSERVED-WANT OF TIM for Respondent(s) : 3.2.3,3.2.4

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 06/02/2007

ORAL JUDGMENT

Arunchandra Ratilal Biscuitwala, petitioner herein has filed this petition under Article 227 of the Constitution of India with a prayer that this Court may quash and set aside the judgment and order dated 30th June 2006 passed in Regular Civil Appeal

No.48 of 2005 by the learned Joint Sessions Judge, Valsad, and the order dated 1st Aug.2005 passed on application Exh.533 in Regular Civil Suit No.39 of 1985 by the learned Civil Judge, Valsad, being without jurisdiction, illegal and unreasonable.

2. The petition was filed on 27th July 2006. When the matter was placed for hearing on 10th Aug.2006, the Court issued Rule and granted ad-interim relief in terms of para 13(D). Thereafter, the matter came up for hearing on 25th Jan.2007.

3. I have heard Mr.P.V.Hathi, learned Senior Counsel for the petitioner. The petitioner is original plaintiff and the respondents are original defendants.

4. The relevant facts of the case are as under :-

4.1 A Civil Suit No.39 of 1985 was filed in the Court of learned Civil Judge, Valsad in the year 1985 by the brother of the present petitioner-plaintiff Shashikant Ratilal for dissolution and for accounts of the partnership firm “Liberty Bakery” and its assets and properties. A Court fee Reference No.48 of 1985 was filed and an objection being raised about valuation and Court fee, the learned Judge decided the said reference being Exh.152 and rejected the same by his order dated 26th Feb.1999.

4.2 The petitioner came to be transposed as

plaintiff after rejection of the application for withdrawal of suit made by Shashikant and the issues were raised in 1999 and the evidence of the petitioner was recorded partly and cross examination was going on. At that time, defendant No.1 filed an application Exh.457 dated 5.5.2003 again on the same issues of Court fees, valuation and pecuniary jurisdiction. The trial Court was pleased to reject that application on 11th Aug.2003 and this order has not been challenged by any of the defendants' brothers and sisters. So the same has become final.

4.3 As defendants were trying to dispose of the partnership properties, the petitioner filed an application Exh.514 on 6.9.2004 for attachment before judgment wherein a counter affidavit showing the valuation of the partnership properties was filed by the petitioner at Exh.527 on 28th Sept.2004. However, the learned trial Judge was pleased to reject said application Exh.527 on 2nd Feb.2005.

4.4 Respondents Nos.2 and 6 did not file written statement and also did not raise any objection regarding valuation and pecuniary jurisdiction of the Court. In spite of that, defendant Nos.2 and 6 filed application Exh.533 on 14th Feb.2005 objecting regarding valuation and pecuniary jurisdiction.

4.5 The learned Civil Judge relying upon the value of the properties stated in the counter affidavit allowed the said application Exh.533 on 1st Aug.2005

by ordering return of the plaint after 20 years of filing of the suit and further saddled the petitioner with cost of Rs.1000/-. The learned Judge did not refer to averments made in the plaint or looking to the nature of the suit, he did not consider the earlier adjudications on the same issues and objections made by the same Court on Court fee reference referred to hereinabove and on application Exh.457.

4.6 Being aggrieved and dissatisfied with the above, the petitioner filed appeal in the District Court and personally argued the matter. He had also filed written arguments at Exh.21 but the learned appellate Judge confirmed the order of return of the plaint on 30th June 2006 without critically considering the nature of the suit, the valuation required under the Court Fees Act as also the competence of the trial Court to pass such an order after the same issue was already decided on earlier occasions by the same Court.

5. Learned Senior Counsel has stated that the Courts below have committed obvious error of jurisdiction in passing order under Order 7 Rule 10 of the Civil Procedure Code after 20 years of the filing of the suit and even though similar applications were already rejected after the report of the Court Fee Inspector, and therefore, both the orders are liable to be quashed and set aside.

5.1 The learned Counsel submitted that the appellate Judge has seriously erred in not correcting the obvious and apparent mistake of the learned trial Judge in not deciding the issue of jurisdiction on the averments made in the plaint. The learned Judge has relied upon a counter affidavit filed in an interim application in the suit. It is submitted that the learned trial Judge has not only decided against the provisions of the Bombay Court Fees Act, in deciding application, Exh.533, but also against the settled principles of law as to how the suit for accounts is to be valued by the plaintiff. It is submitted that both the Courts have not appreciated the mandatory provisions and also not properly followed the binding judgments of the Honourable Supreme Court as well as of this Court in this behalf. It is further submitted that the learned appellate Judge has not referred to the relevant provisions of the Court Fees Act and Civil Courts Act as to how such a suit is to be valued by the plaintiff and the pecuniary jurisdiction of the Court where the suit was pending for last 20 years and when the evidence was being recorded. It is submitted that Order 7 provides that particulars to be contained in plaint and Rule 10 provides for return of plaint and the same could not have been invoked by the learned Judge, particularly, when the said issue was already concluded between the parties in this very suit as shown in the earlier orders. In his further submission, the learned appellate Judge ought to have held that the application was not bonafide

and was made by the defendants solely with a view to protract the litigation after having failed to get the suit withdrawn by the original plaintiff at whose place the petitioner is transposed much against the design and desire of the defendants, particularly, defendant No.1 and, therefore, the application Exh.533 ought to have been rejected.

5.2 The learned Senior Counsel for the petitioner has further submitted that the learned appellate Judge ought to have held that the application Exh.533 dated 14.2.2005 filed under Order 7 Rule 10 was not maintainable even otherwise and that he had no jurisdiction to go beyond his own orders on the same issue passed by his predecessor-in-office. It is submitted that the learned trial Judge had conveniently ignored the basic requirement of finding out the proper valuation of the suit as mentioned in the plaint and the requirement of the provisions of the Court Fees Act but has deliberately referred to the statements regarding value of partnership properties made in counter affidavit at Exh.527 filed at an interim stage in the pending suit. Thus the learned Judge has committed grave mistake in passing the said order. The learned Judge has erred in holding that his Court had no pecuniary jurisdiction and that the suit was required to be transferred to the competent Court after and on payment of the Court fees. It is further submitted that no such order could have been passed by the said learned Senior Judge or could not have been confirmed by the

appellate Judge only because the petitioner had not the assistance of an advocate in the proceedings but who had given his arguments in writing, which are not properly considered at all by the learned Judge.

5.3 That the Courts below failed to appreciate that even assuming that the plaint was required to be returned to the petitioner, they could not have ordered him to make payment of Court fees before filing the suit in the competent Court. It is submitted that such an order was patently without jurisdiction and seems to have been made only with a view to defeat the cause for which the plaintiff was fighting since last 20 years.

5.4 In the above circumstances, it is submitted by the learned senior Counsel for the petitioner that the orders of the Courts below are patently illegal and beyond jurisdiction and therefore, the said orders are required to be quashed and set aside.

6. Mr.P.V.Hathi, learned senior Counsel for the petitioner has relied upon the case of **Satyadhyan Ghosal vs.Smt.Deorajin Debi, reported in AIR 1960 SC 941**, wherein in paragraph 8, it has been observed that:

> "8. The principle of res judicata applies also as between two sages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a

matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

6.1 The learned Senior Counsel has also relied upon the decision of this Court (Coram: S.B.Majmudar, J. - as he then was), in the case of **Maheshchandra Morarji Jani and ors. v. S.M.Shukla & Ors., reported in 1990(1) GLH 420** wherein in paragraph 5, it has been held as under:

"5. It is now well settled that suit for taking accounts of a partnership firm would fall under Section 6(4) of the Bombay Court Fees Act, 1959 which speaks of suits for accounts and the court fee has to be paid according to the amount at which the relief sought is valued in the plaint or the memo of appeal subject to the provisions of Section 8, and subject to a minimum fee of Rs.20/-. As per Section 8 of the Suit Valuation Act, for such suits, valuation for the purpose of court fees will govern valuation for the purpose of jurisdiction and it will be the same. Section 8 of the Suits Valuation Act as applicable to Gujarat reads as under:-

"Where in suits other than those referred to in clause (d) of paragraph (iv), paragraphs (v), (vi), (vii) and (x) and clause (d) of Paragraph (xi) in Section 6 of Bombay Court Fees, 1959, the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same".

After referring to the same, the Hon'ble Court further observed that :-

> “As the disputes which are subject-matter of Reference pertain to dissolution of partnership and for taking accounts of partnership business, if they would have been made subject matter of a suit, the suit would have been governed by Section 6(iv)(i) of the Bombay Court Fees Act. Section 6(iv)(i) of the Bombay Court Fees Act provides for minimum court fee of Rs.20/-. Valuation in such a suit for accounts, normally will be in the vicinity of the figure which would entitle the plaintiff to file suit on minimum court-fees. Such a suit, therefore, could have validly been filed in the court of Civil Judge (J.D.) if the matter was not referred to arbitration but was made subject-matter of civil suit. In this connection, it is also pertinent to refer to a Division Bench judgment of the Bombay High Court in the case of Ishwarappa v. Dhanji, AIR 1932, Bom.111, wherein Patkar, J. speaking for the Division Bench has laid down that in suits for accounts the valuation for the purpose of court fees and for the purpose of jurisdiction shall be that which has been fixed by the plaintiff in the plaint. It is the plaintiff's valuation that fixes the jurisdiction of the court and not the amount which may be found and decided by the court. It was further held that the jurisdiction of a court in a suit for accounts is not therefore ousted after a preliminary decree for accounts is passed by the fact that on taking accounts a sum more than the pecuniary jurisdiction of the court has been found to be due.”

6.1 The learned Counsel has also relied upon the decision of the Bombay High Court, in the case of **Rasika & ors. v. Mount Mary Vaikunta Co-operative Housing Society Ltd., reported in 2003 (3) CCC 248 (Bom.)** more particularly para 27 on page 25, which is reproduced hereunder:

> "27. Viewed from the above angle, if one turns to the objections raised by the appellants and dissects the same, then, it would be clear that except a minor objection to the draft document that it contains the name of a dead person i.e. Shri Madhavdas; there is hardly any substantial objection to the draft document. The another objection sought to be raised by the appellants relates to the nature of the decree. The said objection, in my view, cannot be gone into in this appeal. It cannot be said to be an objection to the draft document. It is an objection which relates to the nature of decree. Such objection is not permissible under Order 21, Rule 34(3) of Civil Procedure Code. Alternatively, assuming it to be within the purview of Rule 34 or Order 21, even then, the appellants cannot succeed in view of the prior order of the executing Court dated 3-9-1997. An identical objection was raised by defendant Nos.5, 6 and 8 along with defendant No.10. The same has been dealt with by the executing Court vide its order dated 3-9-1997. By the said order dated 3-9-1997, the objection in this behalf was overruled. This order was appealable order. No appeal was preferred against this order, with the result, the said order became final and conclusive

> and would operate as *res judicata* between the parties as observed by the Apex Court in Satyadhyan Ghosal v. Smt.Deorajin Debi, wherein the Apex Court ruled that the principle of *res judicata* also applies in between two stages of the same litigation to the extent that a Court, having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the same matter again at a subsequent stage of the same proceedings. In this view of the matter, in my opinion, the order dated 3-9-1997 shall operate as *res judicata*, as such it was not open for the appellants to reiterate and raise the same objection once again with respect to the nature of decree. The executing Court, therefore, rightly held that the decree in question has to be treated as a decree for specific performance of duties cast upon the defendants/judgment debtors. No fault can be found with the finding recorded in this behalf."

7. On behalf of respondents, Mr.J.B.Pardiwala, learned advocate supported the orders of both the Courts below in this behalf.

8. I have considered the facts and circumstances of the case in this behalf. In my view, both the Courts have not taken into consideration the provisions of the Bombay Court Fees Act and the valuation required to be placed in a suit for accounts and the binding nature of the earlier orders passed in the very suit by the same Court in this behalf. I have considered the submissions of Mr.P.V.Hathi, learned senior Counsel and after considering the decision in the

case of Satyadhyan Ghosal (supra) and the decision of this Court in the case of Maheshchandra Morarji Jani (supra) as well as the Bombay High Court judgment in the case of Rasika & Ors. (supra), I am of the view that the learned Judge has not considered these decisions and the earlier order passed in the very same suit by the same Court on similar applications filed by the defendants.

9. In my view, the Courts below have committed serious error of jurisdiction in passing the order under Order 7 Rule 10 of the Code of Civil Procedure after 20 years of filing of the suit even though Civil Applications were already rejected after the report of the Court Fee Inspector, earlier which I have stated and therefore, both the orders are liable to be quashed and set aside. The learned Judge has not properly appreciated the Bombay Court Fees Act and also not properly considered the settled principles of law as to how the suit for accounts is to be valued by the plaintiff in this behalf. The learned Judge has also not properly considered the relevant provisions of the Court Fees Act and Civil Courts Act as to how such a suit is to be valued by the plaintiff and the pecuniary jurisdiction of the Court where the suit was pending for last 20 years and when the evidence was being recorded.

10. In my view, the learned Judge ought not to have invoked Order 7 Rule 10 of CPC particularly when the said issue was already concluded between the parties

in this very suit. In my view, application Exh.533 was barred by principle of res judicata in light of the Apex Court's decision which I have referred to earlier in this behalf. The learned Judge has not considered the earlier order when the orders dated 26.2.1999 and 11.8.2003 were passed respectively below applications Exh.152 and 457 in this behalf.

11. In view of the aforesaid provisions of sub-rule (1) of Rule 10 of CPC, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted. On returning of a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it. In my view, the learned Judge has not given any cogent and convincing reasons for returning the plaint particularly when earlier two occasions the same Court has rejected the said prayer.

12. Considering the facts and circumstances of the case and in view of the decisions as aforesaid, and further that the suit is very old, the matter is required to be disposed of within a stipulated period.

13. In the result, the petition is allowed. The impugned orders passed by the Courts below are quashed and set aside. The matter is ordered to be retained by the trial Court and the trial Court shall

hear and decide the matter after considering the evidence on record in accordance with law as early as possible but preferably by 31st July 2007. Rule is made absolute accordingly, with no order as to costs.

(K.M.Mehta, J.)

Sreeram.